

1 ADAM A. LEWIS (BAR NO. 88736)  
ALewis@mofo.com  
2 VINCENT J. NOVAK (BAR NO. 233003)  
VNovak@mofo.com  
3 KRISTIN A. HIENSCH (BAR NO. 275676)  
KHiensch@mofo.com  
4 MORRISON & FOERSTER LLP  
425 Market Street  
5 San Francisco, California 94105-2482  
Telephone: (415) 268-7000  
6 Facsimile: (415) 268-7522

7 Attorneys for Respondent Secured Creditor  
CIBC INC.

8 UNITED STATES BANKRUPTCY COURT  
9 NORTHERN DISTRICT OF CALIFORNIA  
10 SAN JOSE DIVISION

11 *In re:*

12 Community Towers I, LLC,  
a Delaware limited liability company,  
13 Employer Tax I.D. No.: 75-2456729,

Case No. 11-058944-SLJ-11

14 Community Towers II, LLC,  
a Delaware limited liability company,  
15 Employer Tax I.D. No.: 75-2560662,

Case No. 11-058945-SLJ-11

16 Community Towers III, LLC,  
a Delaware limited liability company,  
17 Employer Tax I.D. No.: 32-0065635,

Case No. 11-058948-SLJ-11

18 Community Towers IV, LLC,  
a Delaware limited liability company,  
19 Employer Tax I.D. No.: 77-0379075,

Case No. 11-058949-SLJ-11

Cases Jointly Administered

20 Debtor(s).

Chapter 11

21 111 W. Saint John Street, Suite 705  
22 San Jose, California 95113

CIBC'S EVIDENTIARY OBJECTIONS  
TO THE DECLARATION OF ERIC  
MOGENSEN IN SUPPORT OF CIBC'S  
OPPOSITION TO THE DEBTORS'  
MOTION TO EXTEND THE STAY  
TERMINATION DATE

23  
24  
25 Date: August 21, 2013  
Time: 2:00 p.m.  
26 Place: Honorable Stephen L. Johnson  
280 S. First Street, Room 3099  
27 San Jose, CA 95113

28 CIBC'S EVIDENTIARY OBJECTIONS RE:  
MOGENSEN DECLARATION

1 In support of CIBC's Opposition to the Debtors' Motion to Extend Date for Termination  
2 of the Automatic Stay, CIBC Inc. ("CIBC") submits these evidentiary objections to the  
3 Declaration of Eric Mogensen In Support of Debtors' Motion to Extend Automatic Stay (the  
4 "Mogensen Dec.").

5 **Opinion Testimony.** Mr. Mogensen identifies himself as a lawyer with considerable  
6 experience in real estate transactions. However, that experience does not make him an expert on  
7 the relevant lending market for commercial office buildings. The Court will recall that experts in  
8 that kind of subject matter have the credentials of a Mr. Ferrell or a Mr. Rodriguez, who testified  
9 at the October 2012 confirmation trial regarding the appropriate interest rate for the proposed plan  
10 based upon the nature of the loan, the property, its historic performance and the feasibility of the  
11 plan. Therefore, Mr. Mogensen's testimony in paragraphs 3 (the first sentence), 6, and 7  
12 (regarding his surmise of the reasons why the market has been unreceptive to the sale or  
13 refinancing efforts of debtors and debtors in possession Community Towers I-IV, LLC (the  
14 "Debtors") of the Mogensen Dec. violate Rule 701 of the Federal Rules of Evidence, which  
15 prohibits lay persons from offering opinion testimony. Moreover, it is doubtful that Mr.  
16 Mogensen's testimony could meet the combined criteria for admissible expert testimony set forth  
17 in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and Rule 702 of the  
18 Federal Rules of Evidence: (1) reliable science;<sup>1</sup> (2) sufficiency of the underlying facts and data;  
19 (3) reliable principles and methods; (4) reliable application of (3); (5) fit (relevance); practical  
20 risks (excessively confusing, time-consuming or misleading).

21 **Hearsay.** Rules 801 and 802 of the Federal Rules of Evidence prohibits testimony about  
22 out-of-court statements to prove the truth of those statements. Paragraphs 3 (after the first  
23 sentence) and 4 violate Rules 801 and 802. The alleged loans do not meet any of the exceptions  
24 to Rule 802 found in Rule 803 of the Federal Rules of Evidence.

25  
26  
27 <sup>1</sup> *Kuhmo Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999) made clear that *Dauber*  
28 applies to all kinds of experts, not just scientific experts.

1       **Best Evidence Rule.** Paragraphs 3 and 4 (to the extent they purport to report on the  
2 contents of documents) also violate Rule 1002 of the Federal Rules of Evidence (the so-called  
3 “Best Evidence Rule”) that requires a party to produce the original, of a document, if feasible, or  
4 otherwise a duplicate to prove the documents contents. *See, e.g., Dye v. United States*, 360 F.3d  
5 744, 750 (7<sup>th</sup> Cir. 2004) (to prove that option exercised party had to produce document exercising  
6 option); *Doss v. Apache Powder Co.*, 430 F.2d 1317, 1322 (5<sup>th</sup> Cir. 1970) (to prove contents of  
7 official records of Canada, party had to produce records).

8       **Relevance.** Rules 401 and 402 of the Federal Rules of Evidence require the exclusion of  
9 irrelevant evidence. Mr. Mogensen’s discussion of the terms offered and accepted by two clients  
10 in paragraphs 3 and 4 of the Mogensen Dec. is irrelevant and should therefore be excluded. There  
11 is nothing in his testimony to indicate that the transactions are in any way comparable to Debtors’  
12 circumstances. *See, e.g., United States v. Baldwin*, 418 F.3d 575 (6<sup>th</sup> Cir. 2005) (evidence of  
13 experiment inadmissible without showing that conditions and circumstances sufficiently similar  
14 to those of situation at issue); *Collins v. B.F. Goodrich Co.*, 558 F.2d 908 (8<sup>th</sup> Cir. 1977) (same).  
15 For example, the nature, location and features of the properties, the loan-to-value ratios, the term  
16 of the loan, and the cash flow available for debt service are among the key lending criteria, yet  
17 Mr. Mogensen provides none of those details concerning his client’s alleged transactions.  
18 Moreover, a mere two transactions do not make or necessarily reflect the relevant market. These  
19 points also apply to whether Mr. Mogensen could satisfy the expert criteria of *Daubert* and Rule  
20 702.

21 Dated: August 7, 2013

ADAM A. LEWIS  
VINCENT J. NOVAK  
KRISTIN A. HIENSCH  
MORRISON & FOERSTER LLP

24 By: /s/ Adam A. Lewis  
ADAM A. LEWIS

26 Attorneys for Secured Creditor  
CIBC INC.